Islamic Research Institute, International Islamic University, Islamabad

Istiḥsān and the Renewal of Islamic Law
Author(s): MOHAMMAD HASHIM KAMALI
Source: *Islamic Studies*, Vol. 43, No. 4 (Winter 2004), pp. 561-581
Published by: Islamic Research Institute, International Islamic University, Islamabad
Stable URL: http://www.jstor.org/stable/20837374
Accessed: 26-10-2015 10:47 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Islamic Research Institute, International Islamic University, Islamabad is collaborating with JSTOR to digitize, preserve and extend access to *Islamic Studies*.

http://www.jstor.org

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

Islamic Studies 43:4 (2004) pp. 561–581

Istiḥsān and the Renewal of Islamic Law*

MOHAMMAD HASHIM KAMALI

Introduction

This essay begins with a review of the definition and varieties of *istiḥsān* and then looks into the question whether *istiḥsān* can be said to be tantamount to, in the parlance of *uṣūl al-fiqh*, particularization of the effective cause (*takhṣīṣ al-'illah*). This is followed by a brief comparison of *istiḥsān* with the doctrine of equity in western jurisprudence, the historical roots of *istiḥsān* and its reception or otherwise by the leading *madhāhib*, and then a brief account of the critique of *istiḥsān* by Imām Muḥammad ibn Idrīs al-Shāfi'ī (d. 204/820) and others. The discussion proceeds with a review of the methodology of *istiḥsān*, and advances, in its final section, a perspective as to how *istiḥsān* can be utilised as an instrument of consolidation between the conventional methodology of *uṣūl al-fiqh* and the substantive themes of the *maqāṣid al-sharī'ah*.

Definition and Varieties of *Istiḥsān*

Being a derivation of the root word *ḥasuna*, *istiḥsān* literally means considering something good, preferable and beautiful. The reference is to beauty, in its common sense, that appeals to the eye and inclines the heart. The word can be used in an objective sense or purely subjectively when, for example, a person, whether a layman or a jurist, likes something and considers it beautiful even if other people might think otherwise. The word is also used with reference to things which might be visible and obvious as well as those that are intellectually perceived.[1]

* This essay is based mainly on my own writings, including my book titled *Istiḥsān (Juristic Preference) and its Application to Contemporary Issues* (Jeddah: Islamic Research and Training Institute, 1997).

[1] Cf. 'Abd al-Karīm Zaydān, *al-Wajīz fi Uṣūl al-Fiqh* (Baghdad: Maktabat al-Quds, 1396/1976), 230; Muḥammad Ismā'īl Abū Bakr Mīqā, *al-Ra'y wa Atharuh fi Madrasat al-Madīnah* (Beirut: Mu'assasat al-Risālah, 1405/1985), 396; Maḥmūd 'Abd al-Qādir Mikādī, "*Baḥth fi 'l-Istiḥsān*" in

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

The leading *madhāhib* have perceived *istiḥsān* somewhat differently from one another. Whereas the Mālikī jurist, Abū Bakr Muḥammad b. 'Abd Allāh Ibn al-'Arabī (d. 435/1148) has simply described *istiḥsān* as acting on the stronger of two evidences (*aqwā 'l-dalīlayn*), the Ḥanafī jurist Abū Bakr Aḥmad b. 'Alī al-Rāzī al-Jaṣṣās (d. 370/980) defined it as departure from a ruling of *qiyās* in favour of another ruling which is considered preferable. The preference so exercised is prompted by the desire to achieve a more equitable solution because of the rigidity or unfairness that is brought about by strict adherence to the existing law. Taqī al-Dīn Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyyah's (d. 728/1328) definition of *istiḥsān* seeks to relate this doctrine more closely to the textual sources and *ijmā'*. *Istiḥsān* is thus defined as "the abandonment of one legal ruling for another which is considered better on the basis of the Qur'ān, *Sunnah* or *ijmā'*." The Ḥanafī jurist Abū 'l-Ḥasan 'Ubayd Allāh b. al-Ḥusayn al-Karkhī's (d. 340/952) definition which is considered to be comprehensive, is as follows:

> *Istiḥsān* is to depart from the existing precedent, by taking a decision in a certain case different from that on which similar cases have been decided, for a reason stronger than the one that is obtained in those cases.[2]

Abū'l-Ḥusayn Muḥammad b. 'Alī al-Ṭayyib al-Baṣrī (d. 436/1044) highlighted the *ijtihādī* content of *istiḥsān* by defining it as "abandoning one facet of *ijtihād* for another, the latter being the stronger of the two and it consists of fresh evidence which is not found in the former."[3]

While quoting al-Karkhī's definition, Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī (d. 483/1090) added that the precedent that is set aside by *istiḥsān* normally consists of an established *qiyās* which may be abandoned by a

---

al-Majlis al-A'lā li Ri'āyat al-Funūn, *Usbū' al-Fiqh al-Islāmī* (Damascus: al-Majlis al-A'lā li Ri'āyat al-Funūn wa 'l-Ādāb wa 'l-'Ulūm al-Islāmiyyah, 1380/1960), 243.

[2] All of these definitions are quoted in 'Alā' 'l-Dīn 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār 'an Uṣūl Fakhr al-Islām al-Bazdawī*, ed. Muḥammad al-Mu'taṣim bi 'llāh al-Baghdādī (Beirut: Dār al-Kitāb al-'Arabī, 1411/1991), 4: 7; Shaykh al-Islām Taqī al-Dīn Ibn Taymiyyah has also quoted and discussed them in his *Mas'alat al-Istiḥsān*. See the Arabic text and trans. in George Makdisi, ed. *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb* (Cambridge, MA: Harvard University Press, 1965), 476 ff. For a discussion of al-Karkhī's definition and that of al-Jaṣṣāṣ, see 'Abd al-Wahhāb Abū Sulaymān, *al-Fikr al-Uṣūlī: Dirāsah Taḥlīlyyah Naqdiyyah*, 2nd edn. (Jeddah: Dār al-Shurūq, 1404/1984), 152–154. For an Eng. translation of the various definitions of *istiḥsān* see Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1986), 410.

[3] Abū 'l-Ḥusayn al-Baṣrī, *Kitāb al-Mu'tamad* (Damascus: al-Ma'had al-'Ilmī al-Faransī li Dirāsāt al-'Arabiyyah, 1965), 2: 839–840; Bukhārī, *Kashf al-Asrār*, 4: 7, n. 1. An English tr. of al-Baṣrī's definition appears in Ahmad Hasan, *Analogical Reasoning*, 410, n. 2.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

superior proof, namely the Qur'ān, *Sunnah*, *ḍarūrah* (necessity) and a stronger *qiyās*. The hallmark of *istiḥsān* for Sarakhsī is the attainment of ease and convenience in legal injunctions.[4]

Some Ḥanafīs have defined *istiḥsān* as "evidence (*dalīl*) which occurs to the mind of the *mujtahid* but he hesitates to articulate it in words."[5] Although it is somewhat vague as to the nature of the evidence involved, this definition seems to have highlighted, perhaps more than any other definition, the subjectivity of *istiḥsān* and its reliance on personal inclination and understanding of the jurist.

Notwithstanding the variation in some respects among these definitions, the basic notion of the *mujtahid*'s departure from one ruling to another and his preference for the latter, whether based on another recognised proof of the *Sharī'ah*, or of preferring one *qiyās* to another, is a common feature of all of these definitions. The departure in question is known as *istiḥsān*, or a preferable departure, because of the stronger evidence that is found in its support.

There are certain differences among the *madhāhib* concerning the evidence on which the preferred ruling may be founded. The Mālikī *istiḥsān* is often based on *maṣlaḥah* whereas the Ḥanafī *istiḥsān* refers mainly to necessity (*ḍarūrah*), and the Ḥanbalī *istiḥsān* tends to rely on the *nuṣūṣ* and *ijmā'*. Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī (d. 790/1388) commented on a comparative note that Mālik ibn Anas (d. 179/795) and Abū Ḥanīfah al-Nu'mān b. Thābit (d. 150/767) saw *istiḥsān* as particularisation of the general on the basis of stronger evidence which is either obvious or implied. Mālik was inclined to do this on the basis of *maṣlaḥah* whereas Abū Ḥanīfah would specify the general by reference to the saying of Companions especially when it was contrary to *qiyās*. Shāṭibī added that the preference given to the stronger of the two evidences in the Mālikī definition actually means giving preference to a particular *maṣlaḥah* (*maṣlaḥah juz'iyyah*) over the general ruling of *qiyās*. The departure may be from an obvious *qiyās* to a more subtle *qiyās*, or it may consist of making an exception to a general rule of the existing law.[6]

The Ḥanafīs have closely identified *istiḥsān* with *qiyās* and have often made the point, as 'Alī b. Muḥammad al-Bazdawī (d. 482/1089) says, that "*istiḥsān* to us is one of the two varieties of *qiyās*."[7] The reference here is, of

---

[4] Shams al-Dīn Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1406/1986), 10: 145.

[5] Cf. Ahmad Hasan, *Analogical Reasoning*, 419, n. 2.

[6] Cf. Abū Isḥāq Ibrāhīm b. Mūsa al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, ed. Shaykh 'Abd Allāh Darāz (Cairo: al-Maktabah al-Tijāriyyah al-Kubrā, n.d.), 4: 208–209.

[7] Bukhārī, *Kashf al-Asrār*, 4: 7, n. 2.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

course, to *qiyās khafi*, that is, hidden or subtle analogy, in contradistinction with *qiyās jalī*, or obvious analogy. *Istiḥsān* is thus seen to be just another name for *qiyās khafi*, which is, in turn, predicated on *qiyās jalī*, in the sense that *qiyās khafi* consists of a departure from *qiyās jalī* and cannot be said to exist without there being a *qiyās jalī* in existence in the first place. This only explains one of the two varieties of *istiḥsān*, namely the analogy-based *istiḥsān*, also known as *al-istiḥsān al-qiyāsī*, as opposed to the *istiḥsān* which consists mainly of making an exception to a ruling of the existing law, which is known as *al-istiḥsān al-istithnā'ī*, or exception-based *istiḥsān*.

This division of *istiḥsān* into the two varieties of analogy-based and exception-based is generally recognised by all the leading schools, although the former is considered to be somewhat controversial as much of the criticism that has been made of *istiḥsān* relates to analogy-based *istiḥsān*. Both types involve abandoning an existing rule for an alliterative ruling, which in the case of analogy-based *istiḥsān* consists of one *qiyās* for another *qiyās*, whereas in the case of exceptional *istiḥsān*, an exception is made to an existing *ḥukm*, whether of *qiyās* or another proof, in favour of a preferable solution for which support can be found in the Qur'ān, *Sunnah*, *ijmā'*, considerations of *maṣlaḥah*, custom (*'urf*), and necessity (*ḍarūrah*). (For the sake of brevity, I propose to place the detailed examples of each of these varieties of *istiḥsān* under Appendix I at the end of this essay).

Istiḥsān and Particularisation (*Takhṣīṣ*)

There are two aspects to this discussion, one of which addresses the question as to whether *istiḥsān* is tantamount to specifying a general rule or *ḥukm* of the *Sharī'ah*, or that of *qiyās*, in conjunction with a certain issue, and the other is whether it consists of particularisation of the effective cause (*'illah*) and through it the *ḥukm*. To say that *istiḥsān* is in the nature of particularisation of the general would imply that *istiḥsān* is not an independent evidence. This is in fact implied in the Mālikī characterisation of *istiḥsān* which consists of acting on a particular benefit (*maṣlaḥah juz'iyyah*) rather than following a general principle by way of making an exceptional concession. This process resembles that of *takhṣīṣ al-'umūm*, or specifying a general text in order to uphold the spirit and purpose of that text. *Istiḥsān* is thus concerned with a better understanding of a general principle of the *Sharī'ah* and its proper implementation with reference to particular issues. Al-Shāṭibī noted that both the Imāms Abū Ḥanīfah and Mālik saw *istiḥsān* as specification of *qiyās* (*takhṣīṣ al-qiyās*) in the event where the application of *qiyās* in a particular instance

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

departed from its own effective cause.[8] Ibn Taymiyyah took a more flexible view of the particularisation of *'illah*. He saw *istiḥsān* as a kind of particularisation of *'illah* where the cause of the original *ḥukm* — which is being abandoned — is present but the *ḥukm* of that *'illah* is absent due to some obstacle. In saying this Ibn Taymiyyah shared the view of the Mu'tazilī scholar, Abū 'l-Ḥusayn al-Baṣrī and also of al-Karkhī. It seems that the presence of an *'illah* without its ruling (*ḥukm*) did not invalidate the *'illah* and that the *'illah* could exist without its relevant *ḥukm*. Both Ibn Taymiyyah and al-Baṣrī have held that the *'illah* may be specified or even isolated from its *ḥukm* when the latter is faced with obstacles. According to Ibn Taymiyyah, when the *'illah* is rational and when the *mujtahid* can understand it, then it may be either completely rejected or modified so as to accommodate certain new cases which can be distinguished from the original case. It was in this way that Ibn Taymiyyah considered *istiḥsān* to be in the nature of *takhṣīṣ al-'illah* either through the modification of the *'illah* or through its total nullification.

The opponents of *istiḥsān* have, on the other hand, asserted that *istiḥsān* violated one of the basic norms of rationality and law by isolating the *'illah* from its *ḥukm* or when it makes an exception to the *ḥukm* of a case despite the presence of its *'illah*. Stated simply, *takhṣīṣ al-'illah* means the existence of a cause and the absence or suspension of its relevant ruling due to an obstacle. This would imply that the advocates of *istiḥsān* can circumvent a *ḥukm*, say of the Qur'ān or *Sunnah*, by ignoring its effective cause. The critics of *istiḥsān* have said that in almost all the rulings of *istiḥsān* there is an analogy which is rejected in favour of some text, consensus or stronger analogy. The cause upon which the rejected analogy depends is still present in each case but without its expected legal effect.[9]

'Ubayd Allah b. Mas'ūd Ṣadr al-Sharī'ah (d. 747/1346) represented the Ḥanafī stance when he wrote that *istiḥsān* was not in the nature of *takhṣīṣ al-'illah* despite the assertion of many to the contrary. This is because abandoning a *qiyās* for a stronger evidence is not *takhṣīṣ al-'illah*. The absence of a *ḥukm* in the case of *istiḥsān* is precisely due to the absence of *'illah*, and not particularisation thereof. This is illustrated by reference to the often-quoted example of the permissibility for human consumption of the leftover of the birds of prey, as opposed to the leftover of predator animals, which is

[8] Cf. Al-Shāṭibī, *al-Muwāfaqāt*, 4: 208-209, note 6; Mīqā, *al-Ra'y wa Atharuh fi Madrasat al-Madīnah*, 401, n. 1, 426.

[9] Ibn Taymiyyah, *Mas'alat al-Istiḥsān*, in Makdisi, ed. *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb*, note 2, pp. 458 ff; Ridwan Yusuf, "The Theory of *Istiḥsān* (Juristic Preference) in Islamic Law" (unpublished Ph.D Thesis, McGill University, Montreal, 1993), 65–67; Ahmad Hasan, *Analogical Reasoning*, 422.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

prohibited, simply because the *'illah* of its prohibition, namely eating or drinking with the tongue, which is present in the case of predators, is absent in the case of birds of prey. *Qiyās* in this case would extend the prohibition from the case of the predator animals to birds of prey, but *istiḥsān* would exclude the latter from the scope of that prohibition because of the absence of the effective cause. *Istiḥsān*, in other words, is not constructed through a mere specification of the *'illah* of the *qiyās* in question but derives its essence from the absence of, and total departure from, that *'illah*.[10]

Al-Sarakhsī strongly criticised those who validated particularisation of *'illah*. He admitted that there were some, even among the Ḥanafīs, who spoke approvingly of the idea of *takhṣīṣ al-'illah*. Sarakhsī attributed this tendency to the Mu'tazilah and denied the basic validity of *takhṣīṣ al-'illah*. In his *Uṣūl* he opened a chapter bearing the title "Explaining the corrupt view that validates *takhṣīṣ* of the *Sharī'ah* causes — *Faṣl fi Bayān Fasād al-Qawl bi-Jawāz al-Takhṣīṣ fi'l 'Ilal al-Shar'iyyah* — and said that the approved position of our predecessors was that *takhṣīṣ al-'illah* was impermissible and anyone who held otherwise "was opposed to the followers of the *Sunnah* and affected by the *uṣūlī* views of the Mu'tazilah." Sarakhsī maintained that what is involved in the idea of *takhṣīṣ al-'illah* amounted to a logical contradiction (*al-tanāquḍ*) which was something totally different from the basic idea of particularisation of the general (*al-takhṣīṣ*) to which there is no objection. Those who validate this logical incongruity, Sarakhsī added, are saying in effect that a *ḥukm* of the *Sharī'ah* may be applied to some cases and may be suspended in other similar cases while the *'illah* is present in both cases and what they say "is totally corrupt and indefensible."[11]

Historical Roots of *Istiḥsān*

The origins of *istiḥsān* can clearly be traced back to the Companions, especially the decisions of the Caliph 'Umar ibn al-Khaṭṭāb (d. 23/644) who suspended the prescribed punishment of theft during the year of the famine on the grounds that applying the normal rules under such conditions evidently would fail to be fair and may even amount to injustice. The Caliph also made a decision concerning a case of inheritance, known as *al-Mushtarakah*, in which he set aside the normal rules of inheritance and provided a solution that

[10] 'Ubayd Allāh b. Mas'ūd Ṣadr al-Sharī'ah, *al-Tawḍīḥ fi Ḥall Ghawāmiḍ al-Tanqīḥ* (Cairo: Dār al-Āfāq al-Jadīdah, 1957), 3: 10; *al-Mawsū'ah al-Fiqhiyyah* (Kuwait: Wizārat al-Awqāf, 1400/1980), 4: 46; Ahmad Hasan, *Analogical Reasoning*, 422.

[11] See for further details Shams al-Dīn Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī*, 2 vols. (Cairo: Maṭābi' Dār al-Kitāb al-'Arabī, 1372 AH), 2: 208–210; see also Bukhārī, *Kashf al-Asrār*, 4: 68, n. 2.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

seemed equitable under the circumstances. In this case a woman died leaving behind two uterine and two germane brothers, mother and husband. The rules of inheritance would entitle the two uterine brothers to one third, the husband to one half and the mother to one-sixth and nothing would be left for the germane brothers who are in the category of *'aṣabah* (residuaries) and take a share only after the *dhawu 'l-furūḍ* (Qur'ānic sharers) have taken theirs. The case was brought to the attention of the Caliph who ruled by way of *istiḥsān* that the germane brothers should share the one-third with the uterine brothers. This was deemed to be just and equitable and was supported by 'Uthmān b. 'Affān (d. 35/656), Zayd ibn Thābit (d. 45/665) and was followed by Imām Mālik, Imām al-Shāfi'ī and more recently in the reformist legislation of Egypt and Syria in 1943 and 1953 respectively.

It is reported concerning the same case that 'Alī ibn Abī Ṭālib (d. 40/661), Ibn 'Abbās (d. 68/687), 'Abd Allāh ibn Mas'ūd (d. 32/653) and a number of other prominent Companions, the Imāms Abū Ḥanīfah, Aḥmad ibn Ḥanbal (d. 241/855) and many others held that the germane brothers should be excluded and the Qur'ānic order of priorities between the various classes of heirs should be strictly applied. This episode has in turn invoked the remark that 'Alī's solution was based on *qiyās*, which was to apply the normal rules regardless of the results, but that 'Umar's solution was based on *istiḥsān*. 'Umar's solution took a comprehensive approach and addressed the basic issue of fairness whereas 'Alī's solution, although correct according to the letter of the text, was evidently less than satisfactory. Notwithstanding the fact that the Caliph 'Umar ibn al-Khaṭṭāb has actually exercised the basic notion and idea of *istiḥsān*, he has probably not used the term nor in fact identified what he did as a principle of *uṣūl al-fiqh*. As a proof and doctrine of *uṣūl*, *istiḥsān* originated in the works of Imām Abū Ḥanīfah and his disciple Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/804). But the word *istiḥsān* appears to have been used, even before Imām Abū Ḥanīfah, by an early Umayyad jurist, Iyās b. Mu'āwiyah (d. 122/740). He is on record to have given the following advice: "Use *qiyās* as a basis of judgment so far as it is beneficial to people, but when it leads to undesirable results then use juristic preference (*fa astaḥsinū*)."[12] This indicates that even before Abū Ḥanīfah, *istiḥsān* was known as a principle by which to correct, substantively speaking, the irregularities of *qiyās*. The name *istiḥsān* was chosen with a view to distinguish one of the two relevant evidences on a particular issue as preferable. The Companion 'Abd Allāh ibn Mas'ūd has employed the word *istiḥsān* and its derivatives on many occasions. Imām Mālik has also used it, and so has Imām Shāfi'ī, despite the fact that he

[12] Quoted in Abū Sulaymān, *al-Fikr al-Uṣūlī*, 152, n. 2.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

has actually spoken against *istiḥsān*.[13]

It seems that *istiḥsān* became controversial only after Imām Abū Ḥanīfah, who has said on occasions that "*qiyās* is such and such but we apply *istiḥsān*," often without elaborating on the underlying reasons of his decisions that were based on *istiḥsān*.[14] This seems to have provoked criticism from the traditionists (Ahl al-Ḥadīth) who charged the proponents of *istiḥsān* with arbitrariness and adjudication without textual evidence. This relative absence of clarity had a bearing particularly on the relationship of *istiḥsān* to *qiyās* which has remained somewhat controversial ever since. al-Shaybānī has resorted to *istiḥsān* on the basis of custom and abandoned *qiyās* when it went against what was accepted by general custom. He also resorted to *istiḥsān* on the basis of necessity (*ḍarūrah*) which entailed a departure from the ruling of *ḥadīth*. For instance, the *ḥadīth* which proscribed the sale of non-existing objects at the time of contract invalidates the advance sale of manufactured goods (i.e. *istiṣnā'*). Al-Shaybānī held, however, that *istiṣnā'* was valid because of necessity despite it being contrary to the ruling of the *ḥadīth*.[15]

Abū Yūsuf Ya'qūb b. Ibrāhīm (d. 182/798) exercised *istiḥsān* when he held that the husband of a woman who renounced Islam and became apostate in her death sickness (*maraḍ al-mawt*) was entitled to inherit from her. The normal rules of the *Sharī'ah* do not permit inheritance between Muslims and non-Muslims, which is why under normal circumstances the husband would not qualify to inherit from his deceased wife who had renounced Islam. However, Abū Yūsuf held that the husband is entitled, by way of *istiḥsān*, to inherit from his deceased wife, and explained that it was just possible that the woman's apostasy during her mortal illness was due to malice. The ruling of *istiḥsān* is thus preferred here because *qiyās* did not make a provision to differentiate between the two states of normal illness and mortal illness and it is through *istiḥsān* that a different ruling was provided for the latter.[16]

Similarly, if someone employs a labourer to dig a well in the vicinity of a public path, the employer must obtain an advance permission from the ruler. Then supposing that this was done and a well was excavated and then someone fell into the well and died as a result, the labourer, according to *qiyās*, would be held responsible. Abū Yūsuf held, on the other hand, that *qiyās* should be abandoned because the labourer acted under the instruction of the employer who had also obtained the ruler's permission. By recourse to *istiḥsān*, Abū

[13] Bukhārī, *Kashf al-Asrār*, 4: 23, n. 2.
[14] Ibid., 4: 8.
[15] Muḥammad b. Ḥasan al-Shaybānī, *al-Siyar al-Kabīr* (Hyderabad, n. p., 1335 AH), 1: 270.
[16] Abū Yūsuf Ya'qūb ibn Ibrāhīm, *Kitāb al-Kharāj*, 2nd edn. (Cairo: al-Maṭba'ah al-Salafiyyah, 1352 AH), 182–83.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

Yūsuf held that the employer's family and kin (*'āqilah*) were responsible for the payment of blood money (*diyyah*) in compensation.[17]

Imām Mālik's understanding of *istiḥsān* was not significantly different from that of his predecessors except that he often used expressions that were equivalent, yet not identical, to *istiḥsān*, such as *aḥabbu ilayya* ("more to my liking") instead of *astaḥsinu* ("I prefer"). In one of his widely quoted statements, Imām Mālik has said that "*istiḥsān* represents nine-tenth of human knowledge."[18] While quoting this, Abū Zahrah wrote that in making this observation, the Imām included the broad concept of *maṣlaḥah* under the purview of *istiḥsān*. "For it is the *maṣlaḥah* which accounts for the larger part of the nine-tenth."[19] This remarkable characterisation of Imām Mālik might seem like an overstatement, but if *istiḥsān* requires persistent search for better solutions and alternatives to the ones that are already known, then *istiḥsān* always aims at greater refinement and continuous improvement of the *status quo* in the interest mainly of public weal and justice. Imām Mālik's statement is also reminiscent of the relationship of *istiḥsān* with the other proofs of the *Sharī'ah*. *Istiḥsān* relates to the entire range of the recognised proofs and seeks to utilise the resources of the *Sharī'ah* in search of more refined solutions to issues.

There are divergent reports about Imām Aḥmad b. Ḥanbal's position concerning the validity of *istiḥsān*. Ibn Taymiyyah has stated that Aḥmad ibn Ḥanbal resorted to *istiḥsān* in many places. This is also what Sayf al-Dīn al-Āmidī (d. 631/1233), Najm al-Dīn Sulaymān b. 'Abd al-Qawī al-Ṭūfī (d. 716/1316) and also Abū 'Amr 'Uthmān b. 'Umar Ibn al-Ḥājib (d. 646/1249) have stated, while 'Abd Allah b. Muḥammad Ibn Qudāmah (d. 620/1223), who is a leading Ḥanbalī scholar, has spoken strongly against *istiḥsān*. The balance of available evidence suggests, however, that Imām Aḥmad has upheld an affirmative outlook on *istiḥsān*. Abū Bakr Mīqā has thus observed that the negative reports from the Imām must therefore be attributed to that variety of *istiḥsān* that is based on unsubstantiated and essentially arbitrary preference.[20]

Istiḥsān and Equity Compared

Istiḥsān is the nearest Islamic law doctrine to the notion of equity in western jurisprudence but the subject calls for some explanation. Equity is a Western

---

[17] Ibid., 182

[18] Al-Shāṭibī, *al-Muwāfaqāt*, 4: 208, n. 6.

[19] Muḥammad Abū Zahrah, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-'Arabī, 1377/1958), 207.

[20] Mīqā, *Al-Ra'y wa Atharuh fi Madrasat al-Madīnah*, 403, n. 2, and 420; Ahmad Hasan, *Analogical Reasoning*, 418, n. 2; *al-Mawsū'ah al-Fiqhiyyah*, "Istiḥsān," 4: 43, n. 10.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

law concept which is grounded in the idea of fairness and conscience, and derives legitimacy from a belief in natural rights and natural justice beyond positive law.[21] *Istiḥsān* in Islamic law and equity in Western law are both inspired by fairness and both authorise departure from a rule of positive law when its enforcement leads to unfair results. The main difference between them, however, is to be sought in the overall reliance of equity on the concept of natural law, and of *istiḥsān* on the values and principles of the *Sharī'ah*. But this difference need not be overemphasised if one bears in mind the convergence of values between the *Sharī'ah* and natural law, and of Islam as *dīn al-fiṭrah* (the natural religion), with natural values. Notwithstanding their different approaches to the question of right and wrong, the values upheld by natural law and the divine law of Islam are substantially concurrent. Both assume that right and wrong are not a maller of relative convenience for the individual but derive from eternally valid standards which are ultimately independent of human cognizance and adherence. But natural law differs from the Divine law in its assumption that right and wrong are inherent in nature.[22] From an Islamic perspective, right and wrong are determined, not by reference to the nature of things, but because God has determined them as such, a perspective that was forcefully articulated by the Ash'arīs. Unlike equity which is founded in the recognition of a superior law, *istiḥsān* does not seek to constitute an independent authority beyond the *Sharī'ah*, and it differs with equity in that the latter recognises a natural law apart from, and essentially superior to, positive law.[23]

A Critique of *Istiḥsān*

Istiḥsān is basically a Ḥanafī doctrine which is also upheld by the Mālikī and Ḥanbalī schools. The Shāfi'īs, the Ẓāhirīs, the Shī'īs and the Mu'tazilah have disputed the basic validity of *istiḥsān*. Whereas the proponents of *istiḥsān* have seen it as a means of opening the *aḥkām* of the *Sharī'ah* to considerations of equity, *maṣlaḥah* and necessity, the opponents of *istiḥsān* have seen it as a means of circumventing the *aḥkām* on grounds merely of personal preference and opinion. This is, in fact, what Imām Shāfi'ī has highlighted in his frontal attack on *istiḥsān*. He devoted a chapter, in both the *al-Risālah* and *al-Umm*, bearing the title "*Kitāb Ibṭāl al-Istiḥsān*" where he characterised *istiḥsān* as a form of arbitrary indulgence in personal preferences (*taladhdhudh wa hawā*), which should be avoided. He referred to the Qur'ānic verses (*al-Nisā'* 4: 59 and

[21] P.G. Osborn, *A Concise Law Dictionary*, 5th edn. (London: Sweet & Maxwell, 1964), 124.
[22] Cf. Malcolm Kerr, *Islamic Reform* (Berkeley: University of California Press, 1961), 57.
[23] Cf. George Makdisi, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law*, 33 (1985), 90.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

al-Qiyāmah 75: 36) and drew the conclusion that the *mujtahid* should give *fatwā* on the basis of a *naṣṣ*, or *ijtihād* which draws an analogy to the *naṣṣ*, but anyone who indulges in personal preference and *istiḥsān* without reliance on *naṣṣ* or *qiyās* has deviated from the correct guidance. That unlike *qiyās* whose propriety can be measured by the methodology which it must follow, *istiḥsān* is not regulated as such. Since *istiḥsān* consists neither of *naṣṣ* nor of analogy to the *naṣṣ*, it is *ultra vires* and must be avoided.[24] Al-Bazdawī wrote that some people criticised Abū Ḥanīfah and his disciples for abandoning *qiyās* in favour of *istiḥsān*, saying that the recognised sources of the *Sharī'ah* are the Qur'ān, the *Sunnah*, *ijmā'* and *qiyās*. As for *istiḥsān*, "no one other than Abū Ḥanīfah and his disciples recognised it as a proof." Abandoning *qiyās* was tantamount to abandoning a recognised *dalīl* for what amounted to no more than fanciful opinion.[25]

Some commentators have seen *istiḥsān* as a principle of marginal significance which cannot claim an independent status among the other proofs of *uṣūl al-fiqh*. Since *istiḥsān* is generally described as acting on the stronger of two evidences and then the departure that is made from one evidence to another is normally from one recognised proof to another recognised proof, it is concluded that *istiḥsān* is not a proof in its own right. Muḥammad b. Muḥammad ibn 'Alī al-Shawkānī (d. 1250/1834) has stated that there is no basis for identifying *istiḥsān* as an independent proof, for if it relies on other proofs then it is a form of repetition, and if it is outside this framework, it is not a part of the *Sharī'ah* and not a proof.[26] This critique, one might say, also highlights an aspect of *istiḥsān* whereby *istiḥsān* is shown to be integral and generic to the entire spectrum of the recognised proofs. As a methodology and formula *istiḥsān* is perhaps more dominantly procedural than substantive. But even this may not do justice to the essence of *istiḥsān* especially when it is admitted that *istiḥsān* operates on the basis of an independent effective cause (*'illah*), and does not merely function as a specifier of the *'illah* of an existing *qiyās*.

While responding to the critics of *istiḥsān*, al-Sarakhsī observed: "Some people have disapproved of *istiḥsān* and considered it invalid. If their disapproval is merely over words and the manner of expression of a certain concept, then there is no objection in using whatever name they may chose

---

[24] Muḥammad ibn Idrīs al-Shāfi'ī, *Kitāb al-Umm* (Cairo: Dār al-Sha'b, 1321), 7: 271–272; Idem, *al-Risālah*, ed. Muḥammad Sayyid Kīlānī, 2nd edn. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1403/1983).

[25] Bukhārī, *Kashf al-Asrār*, 4: 6–7, n. 2.

[26] Muḥammad b. Muḥammad b. 'Alī al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min 'Ilm al-Uṣūl* (Cairo: Idārat al-Ṭibā'ah al-Munīriyyah, 1347 AH), 223.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

for *istiḥsān*, but if they disapprove of the basic concept and essence of *istiḥsān*, then this is unacceptable. For we only depart from the normal rules to another ruling when this is warranted by the recognised proofs of the *Sharī'ah* and we act upon the ruling of *istiḥsān* only when it relies on an evidence which is stronger than *qiyās jalī*."[27]

In his characterisation of *istiḥsān*, al-Shāṭibī concurred with Ibn al-'Arabī's analysis that *istiḥsān* was acting on the stronger of two evidences. Al-Shāṭibī also wrote that the Mālikī view of *istiḥsān* concurred with the analysis that *istiḥsān* was not outside the sphere of the recognised proofs, albeit that *istiḥsān* also involved consideration of the consequences of acts (*ma'ālāt al-af'āl*), something that may or may not have been contemplated in its underlying evidence such as *qiyās*. If one were to ignore this factor, then may be *istiḥsān* consists of no more than telling us that applying this or that proof is good and preferable in a particular case, and that as such it does not propose a new methodology or proof in its own right.[28]

A Review of the Methodology of *Istiḥsān*

Both *qiyās* and *istiḥsān* depend on an effective cause (*'illah*) and identification of *'illah* in both is basically a rational exercise which involves reliance on personal opinion and *ijtihād*. But in the case of analogy-based *istiḥsān* there is a two-fold recourse to *'illah*, one in the initial construction of *qiyās*, and the other in the abandonment of that *qiyās* for an alternative but preferable ruling. The jurist is thus more heavily involved in the exercise of *ra'y*. What is more is that the jurist must make a decision to abandon the existing law for an alternative ruling. This evidently involves speculative judgment whose accuracy can be readily open to question. The strength of *istiḥsān*, however, lies in the essence of that elaborate process and the conviction in which it must originate. The jurist is convinced that an alternative and a more appropriate solution must be found in order to serve the objectives of equity and justice. These two aspects of *istiḥsān*, representative at once of its inherent strength and weakness, have been manifested in the equally extreme positions that were taken by the two prominent Imāms, Mālik and al-Shāfi'ī, one of whom spoke highly of *istiḥsān* and the other rejected it altogether. Yet one hardly fails to notice, in the subsequent development of juristic thought in almost all the leading schools of *fiqh*, a general acknowledgment of the very positive yet sensitive role that *istiḥsān* can play in the adaptation of the *Sharī'ah* to social reality.

---

[27] Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, 10, 145; Mīqā, *al-Ra'y wa Atharuh fi Madrasat al-Madīnah*, 407–408, n. 1.

[28] Al-Shāṭibī, *al-Muwāfaqāt*, 4: 208, n. 6.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

The need for a departure from the normal rules to an alternative ruling in *istiḥsān* is often justified in the name of necessity, common benefit, removal of hardship, general considerations of equity and fairness (*iḥsān*) or indeed a combination of these. If there is a genuine case which has convinced the judge or the *mujtahid* of the need to make an exception, he will usually be able to find a particular basis for it by reference to one or a combination of these proofs. The attempt on the part of the jurists of the Ḥanafī and Mālikī schools to elaborate the methodology of *istiḥsān* and expound the various bases on which it must be shown to have been founded is basically sound as it enhances objectivity and methodological accuracy in the construction of *istiḥsān*.

The theory of *istiḥsān* is evidently anchored in *qiyās* and derives much of its substance from *qiyās*. It may be noted, however, that recourse to *qiyās* or departure from one *qiyās* to another might have presented a useful method in the construction of *istiḥsān* at an early stage of the development of Islamic jurisprudence. This may no longer be the case after the passage of over a thousand years hence. In the present writer's opinion, *qiyās* is not an interminable source and much of the potential opportunities for *qiyās* have probably been already utilised. Since *qiyās* can only be constructed on the basis of an existing *ḥukm* in the higher sources and since the clear injunctions of the text and *ijmā'* are limited in number, *qiyās* may no longer be expected to provide a particularly rich source, as a proof in its own right, or a base for *istiḥsān*.

There are also limitations on the exercise of *qiyās* in judicial decision-making. This is partly due to the fact that judicial precedent, which is recognised in the Common Law system, is not a recognised source under the *uṣūl al-fiqh*. Judicial precedent is, to a large extent, an embodiment of analogical reasoning and application of the ruling of higher courts to new but similar cases that are brought before the lower courts. *Qiyās* has become somewhat burdened with technicality on the one hand, and its potential development is also hampered by the fact that judicial precedent is not a recognised source in *uṣūl al-fiqh*. If there are limitations on the resourcefulness and utility of *qiyās*, one can imagine that the situation is not likely to be any better for the analogy-based *istiḥsān*, which consists not just of one but two analogies. Analogical *istiḥsān* may be attempted in some cases but it would appear to have its limitations.

One way to reduce technicality in the methodology of *istiḥsān* might be to ignore the distinction between the *qiyās jalī* and *qiyās khafī* but to retain the analogical basis of the formula that is involved. This might mean that the new *qiyās* that is proposed in relationship to a particular case, which is designed to offer a preferable alternative may just be considered as a preferable *qiyās*

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

regardless as to how it might relate to the original *qiyās* that is supposed to have been abandoned. To do away with the distinction between *qiyās jalī* and *qiyās khafi* and retain, instead, only a simpler variety of analogical *istiḥsān* which consists of a preferable *qiyās* might help open up the methodology of analogy-based *istiḥsān*.

As for the *istiḥsān* which consists of making an exception to the existing law, attention may be drawn to a few important points. First, when departure from an existing rule is justified on the authority of higher proofs such as the Qur'ān, *Sunnah* and *ijmā'*, the exception that is so made is not *istiḥsān* in its technical sense but a ruling, as the case may be, of the Qur'ān, *Sunnah* or *ijmā'*. Second, a certain adjustment to the conventional typology of *istiḥsān* might be advisable: At the one end of the spectrum, there is the textually-based *istiḥsān* that reads *istiḥsān* into the lines of the Qur'ān and *Ḥadīth*, which is now proposed to be excluded from the typology of *istiḥsān*. Then at the other end of the spectrum, one might propose to add, two other types of *istiḥsān* that are founded on considerations of equity (*iḥsān*) and removal of hardship (*raf' al-ḥaraj*). The substance of this proposal is not new as both of these concepts originate in the Qur'ān and the *'ulamā'* have often acted on them in their juristic endeavours. The suggested adjustment is, therefore, one of format which seeks a clearer identification of the evidential bases of *istiḥsān*. One can, in fact, find instances of recourse to *istiḥsān* that was inspired by considerations of equity and *raf' al-ḥaraj* in the precedent of the Companions, especially that of the Caliph 'Umar ibn al-Khaṭṭāb, in a case of inheritance known as *al-Mushtarakah*, which was discussed above.

With reference to the effective cause (*'illah*) of *istiḥsān*, there is no question in saying that analogy-based *istiḥsān* must proceed on the basis of an identifiable *'illah*. For *qiyās*, whether initial or secondary, cannot be constructed without an *'illah*, and this is precisely the position with regard to analogical *istiḥsān*. But this may be said perhaps generally about all varieties of *istiḥsān* in that abandoning a rule of law or a *qiyās* for a better alternative is always for a certain reason. One can hardly imagine that such a deliberate move of rejecting one position and engaging oneself in active search for an alternative solution can be without a cause. Yet the existing methodology of *uṣūl al-Fiqh* does not stipulate that *istiḥsān* should have an *'illah* nor that the *'illah* should be identified. This is a requirement of *qiyās* but not of *Istiḥsān*. One would normally expect the basic rationale and motivation of the whole exercise to be clear, unmistakable, and in any case, strong enough to warrant abandonment of the existing rules in conjunction with particular issues. It is therefore submitted that *Istiḥsān* should have an identified *'illah*. In cases where the departure in question can find clear support in the textual evidence

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

of the higher proofs, especially the Qur'ān and the *Sunnah*, it would be a matter of applying the latter and the exercise is likely to fall within the ambit of interpretation, which may not even require an elaborate search for the *'illah*. But even so, it is proposed for the sake of clarity and avoiding of indulgence in personal preference, that the basic cause and rationale of *istiḥsān*, be it analogical or exceptional, should normally be identified in any attempt at constructing *istiḥsān*. In doing so it should be sufficient to identify either the specific *'illah* in its technical sense, as in the case of conventional *qiyās*,[29] or the benefit and purpose of the proposed *istiḥsān*, and the mischief or harm that it seeks to prevent. One would imagine that the basic structure of *istiḥsān* in almost all of its varieties is such that makes a reference to these almost inevitable, and if there is a good case, it should not be difficult to identify the cause and underlying rationale of the proposed change through the modality of *istiḥsān*. If there be more than one *'illah* consisting of a variety of influences, one may identify more than one, and it is not proposed that one should take a highly technical approach to the identification of *'illah* for the purpose of arriving at an equitable solution.

The *Maqāṣid al-Sharī'ah* and *Istiḥsān*: A Reform Proposal

There is a considerable parity, both of substance and form, between *istiḥsān* and the ends and purposes of the *Sharī'ah* (*maqāṣid al-Sharī'ah*). The basic theme and philosophy of the *maqāṣid* are almost identical with those of *istiḥsān*. To secure justice, public weal and *iḥsān*, and to find ways to remove and eliminate hardship as well as to accommodate the exigencies of necessity and *'urf* are at once the common themes and objectives of the *maqāṣid* as well as *istiḥsān*. I therefore propose to highlight an aspect of *istiḥsān* which has not received attention in the conventional treatment of this doctrine. The question to be raised here is whether *istiḥsān* can be used as an instrument of consolidation between the *uṣūl al-fiqh* and the *maqāṣid*. The renewed interest in recent decades that contemporary writers and scholars of the *Sharī'ah* have taken in the *maqāṣid al-Sharī'ah* is partly due to the somewhat restrictive and theoretical orientations of *uṣūl fiqh* and its methodology for *ijtihād* which has not responded well to the demands of Islamic revivalism and reform. The *maqāṣid* are, on the other hand, inherently versatile. This is because as a discipline of the *Sharī'ah* the *maqāṣid* are primarily concerned with the ends and objectives of the *Sharī'ah* rather than conformity to technical details, which seem to be the dominant concern of the various doctrines of *uṣūl al-fiqh*.

[29] A discussion of the *'illah* in conjunction with *qiyās* can be found in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), 206 ff.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

The *uṣūl al-fiqh* and the *maqāṣid al-Sharīʿah* have remained separate and the two have not been consolidated to an extent as to present a unified methodology and approach to the understanding of the *Sharīʿah*. For one thing, the *maqāṣid* represented a kind of a postscript or an afterthought, as it were, in the history of Islamic jurisprudence, which emerged centuries after the crystallisation of the legal theory of *uṣūl al-fiqh*. This might offer a partial explanation as to why the *maqāṣid* have remained, even to this day, on the margins of the legal theory of the *uṣūl*. Many a reputable text of *uṣūl al-fiqh* does not even devote a chapter to the *maqāṣid al-Sharīʿah* among the otherwise familiar range of its topics.

The *uṣūl ʿal-fiqh* is admittedly rich and endowed with a distinctive methodology both generally and in its various component parts. The *maqāṣid al-Sharīʿah* on the other hand present a dynamic outlook on the *Sharīʿah*, which is unfettered by technicality and yet it seems to be somewhat lacking in methodological identity and substance. The *uṣūl* and the *maqāṣid* thus both contain elements that can be utilised in the interest of coherence and consolidation in the legal theory of the *Sharīʿah*, and *istiḥsān* can be gainfully employed toward that end. Being an integral theme and topic of *uṣūl al-fiqh*, which is inherently generic and versatile, *istiḥsān* has equally strong grounds of identity with the *maqāṣid*. The evidential basis, rationale and purpose of *istiḥsān* are almost identical with those of the *maqāṣid al-Sharīʿah*. *Istiḥsān* can thus be seen as an instrument of consolidation that can link up the major themes of the goal and the *maqāṣid* into an organic unity. A perusal of the Islamic juristic thought shows, on the other hand, that the unifying potentials of *istiḥsān* have not been utilised in the scholastic treatment of this principle.

The *uṣūlī* treatment of *istiḥsān* has been fraught with unwarranted controversy and although, as if for a brief moment, there was an almost overwhelming acknowledgment of the inner riches of *istiḥsān* by Imām Mālik when he characterised it as "the nine-tenth of human knowledge," this was soon followed by Imām al-Shāfiʿī's outright rejection of *istiḥsān*. If one were to characterise these contrasting positions, one would evidently strike a note with a pro-*maqāṣid* and the other with the pro-literalist *uṣūlī* approach. Since *istiḥsān* is endowed with a methodology that looks in two directions: the textual proofs, *ijmāʿ*, *qiyās*, *maṣlaḥah* and custom on the one hand, and the goals and purposes of the *Sharīʿah*, such as equity and fairness on the other, and since it seeks to realise the ends of the *Sharīʿah* through the evidential support of its means, it offers a unique methodology for synthesising the two undigested chapters of Islamic jurisprudential thought. The theory of *istiḥsān* is focused on finding a better alternative to a ruling or evidence of the *Sharīʿah* when its application has frustrated one of the objectives or *maqāṣid* of the

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

same. The *maqāṣid* lack this focus and do not provide for a *modus operandi* and *istiḥsān* can fill in this gap.

There should be no inherent contradiction in recognising both a primary and a residual role for *istiḥsān* in its capacity as an instrument of consolidation between the *uṣūl* and the *maqāṣid*. In its primary and normative capacity *istiḥsān* may be utilised to ensure harmony between the textual proofs and the *maqāṣid* by reference to alternative evidence in the textual proofs themselves. The emphasis here would be one of ensuring integrality and coherence between the text and the goals of the *Sharī'ah* in that the one should not be read in isolation from the other. Should there arise a conflict between these two aspects of the *aḥkām*, whether conceptual or in terms of actual enforcement, *istiḥsān* should be utilised to vindicate the preferable reading of the text. In its secondary or residual capacity, *istiḥsān* can be utilised much in the same way as it is, in both its analogical and exceptional varieties that have been previously discussed. *Istiḥsān* can thus be applied as an instrument of harmony between the letter and the purpose of the *Sharī'ah* to the entire range of the *aḥkām*.

Conclusion

The brief analysis that is provided here is meant basically to expound the basic outline of a thesis that is capable of further articulation and development. It is hoped that what is proposed here will stimulate further research in order to provide a well developed blueprint as to the various ways *istiḥsān* can be utilised to serve as a vehicle for a more integrated Islamic legal-theory. It would be possible to focus on developing methods and pragmatic suggestions by which to utilize the potentials of the *maqāṣid* while giving in the meantime the *maqāṣid* themselves a stronger foothold in the methodology of *uṣūl al-fiqh*. The research effort that is so undertaken would be equally rewarding for the future of *uṣūl al-fiqh* in that it would be likely to introduce a degree of pragmatism into the otherwise theoretically burdened *uṣūl* methodology. A wide gap has developed between the rich legacy of *uṣūl al-fiqh* and the methods of law making and adjudication in modern times. The *uṣūl* methodology has hitherto not responded well to the demands of renewal and reform of the *Sharī'ah* through *ijtihād*.

The call for the return of original *ijtihād* that was spearheaded by Jamāl al-Dīn al-Afghānī (d. 1898) and his disciple Muḥammad 'Abduh (d. 1905) over a century ago has yet to become a reality and an engaging preoccupation of our *'ulamā'*, law makers and judges. It seems that the much talked about *ijtihād* and the call for its return after the protracted era of imitation (*taqlīd*) has yet to be given a more articulate expression at the level of methodological

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

guidelines. The present effort is hoped to serve that purpose and be seen as a step in the direction of enriching our approaches to reinvigorate *ijtihād*.

Appendix: Examples of *Istiḥsān* (Appended to the Section on the Definition and Varieties of *Istiḥsān*)

Analogical *Istiḥsān*

Supposing A buys a house in a single transaction from B and C at a price of 40,000 dollars payable in instalments. A pays the first instalment of 2,000 dollars to B assuming that B will hand over C's portion to him. But before this happens, B loses the 2,000 and the question arises as to who should suffer the loss. By applying *qiyās jalī*, B and C should share the loss. For this is a case of joint debt (*al-dayn al-mushtarak*) which means that B received the money on behalf of the partnership and not for himself alone. Their position in sharing the loss, in other words, is analogous to their status as partners in the first place. But by applying *istiḥsān* only B who received the money suffers the loss. For C, although a partner, was basically under no obligation to obtain his portion of the 2,000 from B; it was only his right/privilege and he would be at the liberty to waive it. C's portion of the 2,000 dollars would consequently become a part of the remainder of the price (or the debt) that A owes to both. Only B is therefore to suffer the loss. The solution is based on the subtle analogy to the rule that one who is under no obligation should not have to pay any compensation either.[30]

In a similar vein the *waqf* (charitable endowment) of cultivated land includes the transfer of all the ancillary rights which are attached to the property, such as the right of water, right of passage, and the right of flow, even if these are not explicitly mentioned in the instrument of *waqf*. This ruling is based on *qiyās khafi* (or *istiḥsān*) as explained below: It is a rule of the Islamic law of contract that the object of contract must be clearly identified. What is not specified in the contract, in other words, is not included therein. Now if one draws a direct analogy (i.e. *qiyās jalī*) between sale and *waqf*—as both involve transfer of ownership—one must conclude that the attached rights can only be included in the *waqf* if they are explicitly identified. It is, however, argued that such an analogy is unsatisfactory: the *waqf* of

[30] Cf. Muṣṭafā al-Zarqā', *al-Istiṣlāḥ wa 'l-Maṣāliḥ al-Mursalah fi 'l-Sharī'ah al-Islāmiyyah* (Damascus: Dār al-Qalam, 1408/1988), 24; Muḥammad Taqī al-Dīn al-Nabhān, *Muqaddimat al-Dustūr* (Beirut: n. p., 1967), 67.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

agricultural land without its ancillary rights would frustrate the basic purpose of *waqf*, which is to facilitate the use of the property for charitable purposes. To avoid this, recourse is made to an alternative analogy, or *qiyās khafī*, and a parallel is drawn with the contract of lease (*ijārah*). For both of these involve transfer of usufruct (*intifā'*). Since *ijārah* is valid even without a clear reference to the usufruct, this alternative analogy would mean that the *waqf* in question subsumes the attached rights to the property even if these have not been specified in the instrument of *waqf*.[31]

Textually-Based *Istiḥsān* (*al-Istiḥsān bi'l-Naṣṣ*)

This type of *istiḥsān* consists of abandoning a principle or rule that would normally be applicable to the issue at hand—for an alternative ruling for which support can be found in the text of the Qur'ān or *Ḥadīth*.

For an illustration of the textually-based *istiḥsān*, reference may be made to the subject of bequest. The Qur'ān validated making a bequest in favour of one's parents and relatives (*al-Baqarah* 2: 180) despite it being anomalous to the normal rules of the *Sharī'ah*. This is because bequest consists of transfer of ownership after the death of the testator. It is not permissible, in other words, to postpone transfer of ownership to a time when the person who transfers it is no longer the owner. Since a bequest, although made while the testator was alive, becomes effective only after his death, it is said to be basically *ultra vires* and tantamount to interference in the rights of the legal heirs. But the Qur'ān has validated making a bequest to relatives nevertheless. It is then stated that the Qur'ān permitted bequest by way of *istiḥsān*, that is, contrary to *qiyās*.

The option of stipulation (*khiyār al-sharṭ*) also represents an instance of textually-based *istiḥsān*. *Khiyār al-sharṭ* is basically *ultra vires* and disagreeable to the normal principles of contract. As a general rule, a contract becomes binding as of the moment it is validly concluded. *Khiyār al-sharṭ*, on the other hand, entitles the contracting parties to postpone that moment and suspend the legal consequences of contract by means of stipulation to a later date. But since *khiyār al-sharṭ* has been clearly validated in the *ḥadīth* on the grounds of equity and fairness—which is to provide one or both of the contracting parties with an opportunity to decide whether or not to ratify the contract. It is then said that the *Sunnah* validated *khiyār al-sharṭ* by way of *istiḥsān*.[32]

---

[31] Cf. Zakī al-Dīn Sha'bān, *Uṣūl al-Fiqh al-Islāmī* (Kuwait: Jāmi'at al-Kuwayt, n.d.), 153; 'Abd al-Wahhāb Khallāf, *'Ilm Uṣūl al-Fiqh*, 12th edn. (Kuwait: Dār al-Qalam, 1398/1978), 82.

[32] Ibid., 82, n. 31; Muḥammad Yūsuf Mūsā, *al-Madkhal li Dirāsat al-Fiqh al-Islāmī*, 2nd edn. (Cairo: Dār al-Fikr al-'Arabī, 1373/1953), 197; Wahbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1406/1986), 744.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

Istiḥsān and *Ijmā'*

An exception to a general rule of law may be based on *ijmā'* in which case it is said that the *istiḥsān* in question is validated by *ijmā'*. To illustrate this one may refer to *istiṣnā'* or manufacturing contract, which is contrary to the normal rules of contract. When someone places an order for some goods to be made, a contract is concluded in the absence of its subject matter and nothing changes hands at the time. Yet the anomaly of *istiṣnā'* has been ignored and *istiṣnā'* is validated by general consensus, which is why it is said that *istiṣnā'* is contrary to systematic analogy or *qiyās*.[33]

On a similar note, there is consensus among the *'ulamā'* that one who destroys one item of a pair such as a shoe, or one of the two panels of a door, or damages a part of something that is considered a defect as to its whole will be liable to pay compensation for both odds of the pair, or the whole of a matching set as the case may be. The ruling of consensus here represents a departure from the rules of *qiyās* which would require compensation for the part that is actually damaged or destroyed.[34]

Istiḥsān and Necessity (*Ḍarūrah*)

The deposit holder is normally not entitled to spend out of the property that is entrusted to him without the permission of the depositor or the judge. But he may do so in situations of necessity if the depositor is out of reach and it is also difficult to obtain a judicial order for the purpose. In a similar vein, the legally competent heirs of the deceased may spend, by way of *istiḥsān*, on their minor relatives who have no legal executor (*waṣī*) what is necessary out of their own (children's) property without any authorisation. By the same token, when a mosque is without a caretaker but it is recipient of income from a charitable endowment (*waqf*) the people of the locality may spend out of this income to repair any damages in the mosque or to build a fence around it.[35]

Istiḥsān and *Maṣlaḥah*

An idiot (*safih*) who is under interdiction is permitted by way of *istiḥsān* to make a bequest or establish a charitable endowment (*waqf*) regardless of the interdiction. The normal rules of *fiqh* do not permit such a person to make

---

[33] Muḥammad Abū Zahrah, *Uṣūl al-Fiqh*, 211, n. 19.

[34] Al-Shāṭibī, *al-Muwāfaqāt*, 4: 117, n. 6; Maḥmūd 'Abd al-Qādir Mikādī, "*Baḥth fi 'l Istiḥsān*," 314, n. 1.

[35] Muḥammad Amīn Ibn 'Ābidīn, *Ḥāshiyat Radd al-Mukhtār 'alā al-Durr al-Mukhtār* (Cairo: Dār al-Fikr, 1399/1979), 5: 175; Ṣubḥī Rajab Maḥmaṣṣānī, *al-Mūjibāt wa al-'Uqūd fi 'l-Sharī'ah al-Islāmiyyah*, 3rd edn. (Beirut: Dār al-'Ilm lī 'l-Malāyīn, 1983), 1: 77.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions

charitable dispensations but the exception here is based on the rationale that both bequest and *waqf* involve transfer of assets after the death of the testator and *wāqif* and they are, as such, in the nature of preservation, rather than wasteful expenditure, of the existent assets — hence they are validated by way of *istiḥsān* which encourages charity and good work.[36]

In a similar vein, the Egyptian law (No. 344) of 1956 empowered the government to supervise construction and demolition of private buildings which were often motivated by commercial considerations in disregard to their effect on urban planning and environment. The government was consequently granted powers to obstruct unwarranted demolition activities of private buildings through the issuance of licenses for the purpose. The explanatory memorandum that was attached to that law quoted in its support the juristic *fatwā*, based on *istiḥsān*, to the effect that the owner of a house in a prosperous district may be stopped from demolishing his property in due consideration to the interest and welfare of the local residents. The ruling here signified a departure from the normal principle which granted the owner unrestricted freedom as to the manner he dealt with his own property.[37]

Istiḥsān and Custom

The established rules of *fiqh* designated *waqf* as a permanent endowment that can only be instituted over immovable property. Movable property which is liable to destruction and loss is consequently not to be assigned in *waqf*. This general rule was, however, set aside by the Ḥanafī jurist al-Shaybānī who validated the *waqf* of movable goods such as books, tools and weapons simply because popular custom accepted it.[38] Similarly, the right of water (*ḥaqq al-shurb*) may not be sold on its own, that is, independently of the agricultural land which is irrigated by it, because of ignorance of the quantity involved and also uncertainty over the ownership of water that is not in one's possession nor custody. But some Ḥanafī jurists have held it to be permissible by way of *istiḥsān* which is founded in customary approval of this sale.[39]

[36] Cf. Zaydān, *al-Wajīz fī Uṣūl al-Fiqh*, 232.

[37] Cf. Ḥamūd b. Ismā'īl ibn Qāḍī Samawnah, *Jāmi' al-Fuṣūlayn* (Cairo: al Maṭba'ah al-Azhariyyah, 1300 AH), 2: 272; Mikādī, "*Baḥth fī 'l-Istiḥsān*," 328, n. 1.

[38] See Sha'bān, *Uṣūl al-Fiqh al-Islāmī*, 151, n. 31.

[39] Ibid., 151.

This content downloaded from 128.210.126.199 on Mon, 26 Oct 2015 10:47:21 UTC
All use subject to JSTOR Terms and Conditions